

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON

**FOR PUBLICATION**

In re:

PETER A. JACOBSON and  
MARIA E. JACOBSON,

Debtors.

No. 08-45120

**DECISION ON RELIEF FROM STAY**

Before the court is a motion for relief from the automatic stay of § 362(a)<sup>1</sup> to enforce a deed of trust on the Debtors' residence. As it was neither brought in the name of the real party in interest, nor by anyone with standing, the motion for relief from stay will be DENIED.

**I. History**

Attached to the motion of "UBS AG, as servicing agent for ACT Properties, LLC ("Movant")" (docket no. 31) are unauthenticated copies of:

<sup>1</sup>

Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23. "Rule" references are to the Federal Rules of Bankruptcy Procedure, and "FRCP" and "FRE" references to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, respectively.

"GR" references are to the Local Rules, U.S. District Court, W.D. Washington, and "LBR" to the Local Bankruptcy Rules, W.D. Washington.

"RCW" references are to the Revised Code of Washington.

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- 1        1.    The adjustable rate note purportedly executed on  
2            14 November 2009 in Elkridge, Maryland, by Debtors in favor of  
3            Castle Point Mortgage, Inc., which bears an undated "without  
4            recourse" indorsement in blank by someone identified as  
5            "VP/CFO";
- 6        2.    A barely-legible copy of Debtors' deed of trust in favor of  
7            Castle Point Mortgage (as "lender"); the beneficiary is  
8            identified as Mortgage Electronic Registration Systems, Inc.  
9            ("MERS"), a separate corporation, "solely as nominee for  
10          lender and lender's successors and assigns," with an  
11          adjustable rate rider (executed in Pierce County, Washington,  
12          on the same day as the note, according to the acknowledgment);
- 13       3.    An apparently unrecorded "Assignment of Mortgage" to ACT  
14          Properties, LLC, referencing the deed of trust by parties,  
15          date, and recording number, executed by a director of MERS in  
16          December of 2008, according to the acknowledgment; and
- 17       4.    Debtors' real property and secured claims schedules (A and D,  
18          respectively, the latter identifying the secured creditor as  
19          "UBS").

20        The motion notes Debtors' bankruptcy petition, filed 7 October  
21 2008, the attendant automatic stay, and goes on to recount the history  
22 of the loan, including its transfer "to Movant," stating that Wells  
23 Fargo Document Custody "has possession" of the original note in  
24 Minneapolis, Minnesota. The narrative continues with Debtors' default  
25 and the commencement of non-judicial foreclosure proceedings, with sale  
26 set for 17 October 2008, (presumably by a predecessor in interest of ACT  
27

1 Properties, since it was pre-assignment; the foreclosing party is not  
2 identified). The Debtors' filing automatically stayed the foreclosure,  
3 § 362(a); the motion indicates no foreclosure activity is pending.  
4 There follows a calculation of the amounts due and lack of equity, and  
5 sketchy argument that the Movant is entitled to relief under § 362(d)(1)  
6 for lack of adequate protection.

7 The motion is supported by the declaration of a "bankruptcy  
8 specialist" (docket no. 32) which parrots the narrative set forth in the  
9 motion (or perhaps it is the other way around – the text respecting the  
10 history of the transaction and documentation is virtually identical, and  
11 both make the same mistake regarding the date the deed of trust was  
12 executed – they both state that the deed of trust was executed  
13 8 December 2006, while the acknowledgment shows it as 14 November 2006).  
14 Declarant, too, declares that Wells Fargo Document Custody "has  
15 possession" of the original note in Minnesota, and indicates that true  
16 copies of the note, deed of trust, and assignment are attached, but  
17 there are no exhibits to the filed declaration. The declaration was  
18 executed in Irvine, California.

19 No evidence is provided, nor is any assertion even made, regarding  
20 UBS AG's authority to act for the holder of the note, beyond the  
21 unelaborated statements that it is "servicing agent for ACT Properties,  
22 LLC" in the motion, and "servicing agent for ACT Properties, LLC, its  
23 successors and/or assigns" in the declaration.

24 Nor do the papers disclose what kind of an entity "UBS AG" is.  
25 "AG" may indicate a corporate entity from Germany, Switzerland,  
26 Liechtenstein, Austria, or perhaps elsewhere, and UBS is a major Swiss

1 financial institution. See Nelson D. Schwartz, *For Swiss banks, an*  
2 *Uncomfortable Spotlight*, Int'l Herald Tribune, March 4, 2009,<sup>2</sup> and  
3 *UBS AG: a Short History*.<sup>3</sup>

4 This latter point became significant when Debtors, pro se (although  
5 they have counsel), filed their Motion to Dismiss Movant's Motion for  
6 Relief from Stay (docket no. 44), the thrust of which is that UBS  
7 transferred the security in the real property to the Central Bank of  
8 Switzerland in return for approximately \$220,000, and referencing  
9 numerous press and internet accounts respecting the Swiss bank. Debtors  
10 do not explicate how they reach the conclusion, from news stories about  
11 the handling of toxic assets in the banking systems of this country and  
12 Switzerland, that UBS AG (or UBS AG, which only claims to service the  
13 loan for another holder) was paid an amount approximating the default  
14 alleged in the motion. That said, they raise a standing question.

15 UBS AG's counsel, while located in San Diego, California, is  
16 admitted to practice in this district and electronically filed the  
17 motion and supporting papers. He continued the motion once and then  
18 confirmed the motion for hearing two days prior to the calendar, also  
19 via the court's electronic filing system. A local practitioner whose  
20  
21

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22 <sup>2</sup> available at:

23 <http://www.iht.com/articles/2009/03/04/business/04>  
24 [swiss.php](http://www.iht.com/articles/2009/03/04/business/04) (last visited 4 March 2009)

25 <sup>3</sup> available at:

26 [http://www.ubs.com/1/e/about/history/a\\_short\\_histo](http://www.ubs.com/1/e/about/history/a_short_history.html?isPopup=yes)  
27 [ry.html?isPopup=yes](http://www.ubs.com/1/e/about/history/a_short_history.html?isPopup=yes) (last visited 5 March 2009).

1 role in the case was not disclosed in the docket appeared for UBS AG at  
2 the continued hearing; Debtor Peter Jacobson appeared pro se.

## 3 4 **II. Jurisdiction**

5 This is a core proceeding within this court's jurisdiction.  
6 28 U.S.C. §§ 1334(a) and (b), and 157(a) and (b)(2)(G); GR 7, ¶ 1.01,  
7 Local Rules, W.D. Washington.

## 8 9 **III. Issues**

### 10 **A. Appearances**

11 Were the parties properly represented at hearing?

### 12 13 **B. Real Party in Interest**

14 Is a "servicing agent" the real party in interest in whose name a  
15 relief from stay motion may be brought?

### 16 17 **C. Standing**

18 Does UBS AG or Movant have standing to seek relief from stay to  
19 enforce Debtors' deed of trust?

## 20 21 **IV. Analysis**

### 22 **A. Appearances**

23 Debtors were and still are represented by counsel in this case.  
24 Although they filed their response to the motion pro se, they indicate  
25 having informed counsel of their intent to file their response. I infer  
26 counsel declined to argue their position. Nevertheless, because I have

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1 an independent duty to determine jurisdiction, see part IV.C. below, the  
2 question is before me, and Mr. Jacobson appeared at the hearing.

3 GR 2(g)(1) permits the court to hear represented individuals, even  
4 though their counsel is not present:

5 Whenever a party has appeared by attorney, he cannot  
6 thereafter appear or act in his own behalf in the cause, or  
7 take any step therein; provided, that the court may in its  
discretion hear a party in open court, notwithstanding the  
fact that he has appeared, or is represented by attorney.

8 Respecting Movants' representation at the hearing, Rule 9010(b)  
9 provides that:

10 [a]n attorney appearing for a party in a case under the Code  
11 shall file a notice of appearance with the attorney's name,  
office address and telephone number, unless the attorney's  
12 appearance is otherwise noted in the record.

13 (emphasis added). In other words, an attorney must first file a notice  
14 of appearance containing the data specified in Rule 9010(b) to represent  
15 a party in a hearing.

16 In addition to Rule 9010(b), a local rule of the U.S. District  
17 Court for the Western District of Washington, which applies via  
18 LBR 9029-2,<sup>4</sup> requires:

19 An attorney eligible to appear may enter an appearance in a  
20 civil case by signing any pleading or other paper described in  
Rule 5(a), Federal Rules of Civil Procedure, filed by or on

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22 <sup>4</sup> Which provides:

23 The Local Rules of the United States District Court  
24 for the Western District of Washington (herein  
"Local Rules W.D. Wash.") are rules of the United  
25 States Bankruptcy Court for the Western District of  
Washington, except as they may be inconsistent with  
26 Title 11, United States Code (herein "Bankruptcy  
Code"), the Federal Rules of Bankruptcy Procedure,  
27 or these Local Bankruptcy Rules.

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1       behalf of the party the attorney represents, or by filing a  
2       Notice of Appearance.

3 GR 2(h). No formal notice of appearance is required so long as the new  
4 attorney has somehow made his or her involvement in the case known prior  
5 to the hearing, such as by signing and filing pleadings.

6       But once counsel has appeared, GR 2(g)(3) provides:

7       The authority and duty of attorneys of record shall continue  
8       until there shall be a substitution of some other attorney of  
9       record, except as herein otherwise expressly provided, and  
10       shall continue after final judgment for all proper purposes.

11       And GR 2(g)(2)(B):

12       Where there has simply been a change or addition of counsel  
13       within the same law firm, an order of substitution is not  
14       required; the new attorney will file a Notice of Appearance  
15       and the withdrawing attorney will file a Notice of Withdrawal.  
16       However, where there is a change in counsel that effects a  
17       termination of one law office and the appearance of a new law  
18       office, the substitution must be effected . . . which  
19       requires leave of court.

20       And, of course, corporations must be represented by counsel in  
21 federal court. See Rowland v. California Men's Colony, 506 U.S. 194,  
22 201-02 (1993).

23       The careful reader will have noticed that none of the foregoing  
24 rules directly address the situation where the original attorney  
25 continues as counsel of record, but another lawyer, not of the same  
26 firm, joins for some portion of the representation. But, read together,  
27 the requirement of corporate representation and the continuing role of  
28 counsel of record preclude interloping counsel. For other attorneys not  
part of the same firm as record counsel to represent a party, something  
must be done of record. Customarily, this is accomplished by filing a

1 notice of association, and it is common when lead counsel is distant and  
2 the use of local counsel for particular matters in the case will promote  
3 efficiency, or the new counsel provides particular expertise. Once the  
4 notice of association is served and filed, all parties to the case are  
5 aware of the changed representation, and associated counsel receives  
6 notice directly of events and filings in the case.

7       The practice of undisclosed "appearance attorneys" creates  
8 problems – other parties (and the court) are sandbagged, and the Debtor,  
9 trustee, other creditors, and counsel cannot readily communicate  
10 regarding scheduling or substance. In addition to the ramifications of  
11 this practice, explored in In re Wright, 290 B.R. 145 (Bankr. C.D. Cal.  
12 2003); Hon. Jim D. Pappas, Simple Solution = Big Problem, 46 The [Idaho]  
13 Advocate 31 (Oct. 2003); and Neil M. Berman, Judge, This is Not My  
14 Case . . ., Norton Bankr. L. Adviser 3 (May 2004), the lack of formal  
15 association could raise questions about the informally-appearing  
16 attorney's authority to speak for, and make judicial admissions on  
17 behalf of, the client (the contrary suggestion would not be a promising  
18 argument).

19       While this defect is not dispositive, clarity of representation on  
20 the record is important to judicial economy and the orderly  
21 representation of other parties. So I will require, absent emergency or  
22 significant hardship, formal notice of association to be filed not later  
23 than the confirmation of the hearing. And there is no remedy for self-  
24 inflicted harm – law firms undertaking distant representations must be  
25 prepared to appear or timely associate local counsel who will. As  
26 corporations must be represented by counsel in federal court, the



1 consequence of not having counsel of record at hearing will be that that  
2 party's position may be deemed without merit. See LBR 9013-1(e)(1).<sup>5</sup>  
3 This is the flip side of Woody Allen's observation that "Eighty per cent  
4 of success is showing up"<sup>6</sup> – if you (or your counsel of record if you are  
5 a corporate entity) don't, your chance of success approaches zero.

6 In short, henceforth only counsel of record or individuals  
7 representing themselves will be heard.

8  
9 **B. Real Party in Interest**

10 The moving party here is UBS AG, which claims only to be a servicer  
11 for the holder of the note. It neither asserts beneficial interest in  
12 the note, nor that it could enforce the note in its own right. As noted  
13 in In re Hwang, 396 B.R. 757, 766-67 (Bankr. C.D. Cal 2008), Rule 4001  
14 makes stay relief a contested matter by providing that Rule 9014  
15 governs. That rule in turn applies Rule 7017, imposing FRCP 17's  
16 requirement<sup>7</sup> that actions be prosecuted in the name of the real party  
17 interest.

18  
19 <sup>5</sup> Which provides:

20 [A]pppearance is required at all scheduled hearings.  
21 Failure to appear at the date and time appointed  
22 for hearing may be deemed by the court to be an  
admission that the motion, or the opposition to the  
motion, as the case may be, is without merit.

23 <sup>6</sup> Quoted in Thomas J. Peters and Robert H. Waterman, In Search  
24 of Excellence, Harper & Row 1982, at 119.

25 <sup>7</sup> Which provides in (a)(1):

26 An action must be prosecuted in the name of the  
27 real party in interest. . . .

1 [t]he right to enforce a note on behalf of a noteholder does  
2 not convert the noteholder's agent into a real party in  
3 interest. "As a general rule, a person who is an attorney-in-  
4 fact or an agent solely for the purpose of bringing suit is  
viewed as a nominal rather than a real party in interest and  
will be required to litigate in the name of his principal  
rather than in his own name."

5 Hwang, 396 B.R. at 767, quoting 6A Wright, Miller & Kane, Federal  
6 Practice and Procedure: Civil 2d § 1553.

7 The real party in interest in relief from stay is whoever is  
8 entitled to enforce the obligation sought to be enforced. Even if a  
9 servicer or agent has authority to bring the motion on behalf of the  
10 holder, it is the holder, rather than the servicer, which must be the  
11 moving party, and so identified in the papers and in the electronic  
12 docketing done by the moving party's counsel.

13 It follows that orders granting relief from stay must do so to the  
14 holder of the obligation to be enforced – not the servicer or others, or  
15 the collective "Movant," as in the proposed order UBS AG submitted. Of  
16 course, setting forth that the holder may act through agents, or may  
17 later assign or transfer the interest, e.g., "ACT Properties, LLC, and  
18 its agents, successors, and assigns," is appropriate.

1 If UBS AG'S motion had merit, the standing deficiency could be  
2 cured by joinder, as FRCP 17(a)(3),<sup>8</sup> applicable via Rules 9014 and 7017,  
3 allows. As will be seen, joinder would not salvage this motion.

4  
5 **C. Standing**

6 UBS AG has submitted no evidence that it is authorized to act for  
7 whomever holds the note. That deficiency puts its standing in question,  
8 See In re Parrish, 326 B.R. 708, 720-21 (Bankr. N.D. Ohio 2005), and I  
9 have an independent duty to determine whether I have jurisdiction over  
10 matters that come before me. FW/PBS, Inc. v. City of Dallas, 493 U.S.  
11 215, 231 (1990). I must therefore determine whether UBS AG (or Movant}  
12 has standing to seek relief from stay.

13  
14 **1. Law:** For a federal court to have jurisdiction, the litigant  
15 must have constitutional standing, which requires an injury fairly  
16 traceable to the defendant's allegedly unlawful conduct and likely to be  
17 redressed by the requested relief. United Food & Commercial Workers  
18 Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 551 (1996).

19 [T]he question of standing is whether the litigant is  
20 entitled to have the court decide the merits of the dispute or  
21 of particular issues. Standing doctrine embraces several  
judicially self-imposed limits on the exercise of federal

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22 <sup>8</sup> Which provides:

23 The court may not dismiss an action for failure to  
24 prosecute in the name of the real party in interest  
25 until, after an objection, a reasonable time has  
26 been allowed for the real party in interest to  
27 ratify, join, or be substituted into the action.  
After ratification, joinder, or substitution, the  
action proceeds as if it had been originally  
commenced by the real party in interest.

jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights . . . .

. . . .

Typically . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.

Allen v. Wright, 468 U.S. 737, 750-52 (1984) (citations omitted). Constitutional standing, predicated on the "case or controversy" requirement of Article III of the Constitution, is a threshold jurisdictional requirement, and cannot be waived. Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895, 899-900 (9th Cir. 2000).

A litigant must also have "prudential standing," which stems from rules of practice limiting the exercise of federal jurisdiction to further considerations such as orderly management of the judicial system. Pershing Park, 219 F.3d at 899-900; In re Godon, 275 B.R. 555, 564-565 (Bankr. E.D. Cal. 2002) (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541-42 (1986)).

Generally, a party without the legal right under applicable substantive law to enforce the obligation at issue, or pursuing an interest outside those protected by the law invoked or abstract questions more appropriately addressed legislatively, lacks prudential standing. Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1044 (9th Cir. 2008).

Under the Bankruptcy Code, a party seeking relief from stay must establish entitlement to that relief. § 362(d); see In re Hayes, 393 B.R. 259, 266-267 (Bankr. D. Mass. 2008). Foreclosure agents and servicers do not automatically have standing, In re Scott, 376 B.R. 285,

290 (Bankr. D. Idaho 2007); Hwang, 396 B.R. at 767, and must show authority to act for the party which does.

In Washington, only the holder of the obligation secured by the deed of trust is entitled to foreclose. RCW 61.24.005(2) defines "beneficiary" under a deed of trust as the holder of the instrument or document evidencing the obligations secured by the deed of trust.<sup>9</sup> See also Fidelity & Deposit Co. of Maryland v. Ticor Title Ins. Co., 88 Wash. App. 64, 943 P.2d 710 (1997). Having an assignment of the deed of trust is not sufficient, id. at 68-69, because the security follows the obligation secured, rather than the other way around. This principle is neither new nor unique to Washington:

[T]ransfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.

Carpenter v. Longan, 83 U.S. 271, 275 (1872).

It follows that, to have standing, UBS AG must establish its authority to act for the holder of Debtors' note.

**2. Evidence:** Some courts require a party moving for stay relief to provide admissible evidence tracing the identity of the various holders and servicers of the mortgage or deed of trust in question, and the holders of the note evidencing the underlying obligation. See Hayes, 393 B.R. at 269; and Parrish, 326 B.R. at 720-21. I need not here go so far, because UBS AG's proof neither shows who presently holds Debtors' note nor its own authority.

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<sup>9</sup> Which renders problematic the identification of MERS "solely as nominee . . ." as the beneficiary of Jacobsons' deed of trust.

1 While business records may provide the necessary proof, this  
2 exception to the hearsay rule<sup>10</sup> requires that the records (1) be made at  
3 or near the time by, or from information transmitted by, a person with  
4 knowledge; (2) pursuant to a regular practice of the business activity;  
5 (3) kept in the course of regularly conducted business activity; and  
6 (4) the source, method, or circumstances of preparation must not indicate  
7 lack of trustworthiness. These elements must be established by the  
8 testimony of a custodian or other qualified witness, and the documents  
9 must be authenticated. In re Vinhnee, 336 B.R. 437, 444 (9th Cir. BAP  
10 2005). Specifically, "the record being proffered must be shown to  
11 continue to be an accurate representation of the record that originally  
12 was created." Id.; FRE 901(a).<sup>11</sup> A declarant authenticating business

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13  
14 <sup>10</sup> FRE 803(6) provides:

15 Records of Regularly Conducted Activity.--A  
16 memorandum, report, record, or data compilation, in  
17 any form, of acts, events, conditions, opinions, or  
18 diagnoses, made at or near the time by, or from  
19 information transmitted by, a person with  
20 knowledge, if kept in the course of a regularly  
21 conducted business activity, and if it was the  
22 regular practice of that business activity to make  
23 the memorandum, report, record or data compilation,  
24 all as shown by the testimony of the custodian or  
25 other qualified witness, or by certification that  
26 complies with Rule 902(11), Rule 902(12), or a  
27 statute permitting certification, unless the source  
28 of information or the method or circumstances of  
preparation indicate lack of trustworthiness. The  
term "business" as used in this paragraph includes  
business, institution, association, profession,  
occupation, and calling of every kind, whether or  
not conducted for profit.

25 <sup>11</sup> Which provides:

26 The requirement of authentication or identification  
27 as a condition precedent to admissibility is  
28 satisfied by evidence sufficient to support a

1 records must be qualified. The bare assertion that one works for the  
2 company and is familiar with its recordkeeping procedures is not  
3 sufficient: "there needs to be enough information presented to  
4 demonstrate that the person is sufficiently knowledgeable about the  
5 subject of the testimony." Vinhnee, 336 B.R. at 448 (citation omitted).  
6 The testimony must contain information warranting the conclusion that the  
7 proffered records are what they purport to be. Id.

8 The only evidence UBS AG has submitted is the declaration of one of  
9 its bankruptcy specialists. The initial paragraph of the declaration  
10 reads:

11 I am employed as a Bankruptcy Specialist by UBS AG, as  
12 servicing agent for ACT Properties LLC, its successors and/or  
13 assigns ("Movant"). In this capacity, I am one of the  
14 custodians of the books, records, files and banking records of  
15 Movant, as those books, records, files and banking records  
16 pertain to the loans and extensions of credit by Movant to  
17 Peter A. Jacobson and Maria E. Jacobson ("Debtors"). I have  
personally worked on said books, records, files and banking  
records and, as to the following facts, I know them to be true  
of my own knowledge or I have gained knowledge of them from  
the Movant's business records, which were made at or about the  
time of the events which were recorded, and which are  
maintained in the ordinary course of Movant's business.

18 Declaration in Support . . . (docket no. 32).

19 One hopes the declarant is not as unsure of his own identity as this  
20 imprecision suggests: is he employed as a bankruptcy specialist by  
21 UBS AG only in its capacity as servicing agent for ACT Properties? Or  
22 for a successor or assignee of ACT? Or is he a bankruptcy specialist for  
23 UBS AG and its successors and/or assigns? Is he one of the custodians  
24 of "the books, records, files and banking records" of all of these

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25  
26 finding that the matter in question is what its  
proponent claims.

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1 entities? And since the motion must be brought in the name of the real  
2 party in interest; i.e., the present holder of Debtors' note, what is the  
3 relevance of a possible future successor or assignee? Or if the  
4 antecedent of "successors and/or assigns" is UBS AG, how does declarant  
5 know he will be employed by whomever it is, or have access to its  
6 records?

7       Setting aside for the moment that no business records are actually  
8 proffered – the declarant recounts his conclusions, from whatever records  
9 he consulted, and we are told that he is one of the custodians, that he  
10 works on those records, that they were made at or about the time of the  
11 events recorded, and that they are maintained in the ordinary course of  
12 Movant's business. While that formulaic recitation attempts to satisfy  
13 FRE 901(a), it would not withstand an objection to admissibility: there  
14 is nothing meaningful regarding the declarant's qualifications to  
15 authenticate business records, or the reliability of those records in  
16 this instance.

17       That reliability is questionable, given obvious errors, such as the  
18 date the Debtors executed the deed of trust and the assertion of a loan  
19 or extension of credit "by Movant" to the Jacobsons – the lender (and the  
20 payee of their note) was Castle Point Mortgage, Inc., not included in  
21 either of the compositions of "Movant" set forth in UBS AG's papers. And  
22 which of the matters he recounts are things he knows to be true of his  
23 own knowledge, and which did he gain from someone's business records?  
24 More fundamentally, ACT Properties was assigned the deed of trust just  
25 days before the motion was filed. Why should credence be given to



1 UBS AG's records "as servicing agent for ACT Properties" respecting  
2 anything before that assignment?

3 But even if all of the deficiencies were overlooked or resolved in  
4 Movant's favor, one emerges from the syntactical fog into an impassable  
5 swamp. The declaration of someone in California, apparently based on  
6 business records, and perhaps predating his employer becoming servicing  
7 agent, is that Debtor's note secured by the deed of trust is in "the  
8 possession"<sup>12</sup> of a separate entity in Minnesota. Assuming the exhibits  
9 to the motion are authentic and are the same as those intended to have  
10 been attached to the declaration, the note is indorsed in blank. Without  
11 more, that and possession (rather than mere custody) suggests that Wells  
12 Fargo is the holder of the note. RCW 62A.3-201<sup>13</sup> and 3-301<sup>14</sup>. Nothing

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13  
14 <sup>12</sup> So in both the motion (at 3:11) and in the declaration  
(at ¶ 4).

15 <sup>13</sup> Which provides:

16 (a) "Negotiation" means a transfer of possession,  
17 whether voluntary or involuntary, of an instrument  
18 by a person other than the issuer to a person who  
thereby becomes its holder.

19 (b) Except for negotiation by a remitter, if an  
20 instrument is payable to an identified person,  
21 negotiation requires transfer of possession of the  
instrument and its indorsement by the holder. If an  
instrument is payable to bearer, it may be  
negotiated by transfer of possession alone.

22 <sup>14</sup> Which provides:

23 "Person entitled to enforce" an instrument means  
24 (i) the holder of the instrument, (ii) a nonholder  
in possession of the instrument who has the rights  
25 of a holder, or (iii) a person not in possession of  
the instrument who is entitled to enforce the  
26 instrument pursuant to RCW 62A.3-309 or 62A.3-  
418(d). A person may be a person entitled to  
27 enforce the instrument even though the person is

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1 in the record establishes on whose behalf (if other than its own) Wells  
2 Fargo Document Custody possesses the note; that (and verification of  
3 current possession and present ability to produce the original, if  
4 required) would have to come from Wells Fargo.

5 Nor does anything in the record establish UBS AG's authority to  
6 enforce the Debtors' note, for whomever holds it; and thus to foreclose  
7 the deed of trust. The declaration states that UBS AG is "servicing  
8 agent," a term with no uniform meaning, and no definition cited. At a  
9 minimum, there must be an unambiguous representation or declaration  
10 setting forth the servicer's authority from the present holder of the  
11 note to collect on the note and enforce the deed of trust. If  
12 questioned, the servicer must be able to produce and authenticate that  
13 authority.

14 UBS AG has not shown that it has standing to bring the motion for  
15 relief from stay or authority to act for whomever does.

16  
17 **V. CONCLUSION**

18 As the motion was not brought in the name of the real party in  
19 interest, nor has standing to bring it been established, it will be  
20 **DENIED.**

21 **/// - END OF DECISION - ///**

22  
23 

24 Philip H. Brandt  
United States Bankruptcy Judge  
(Dated as of "Entered on Docket" date above)

25  
26 not the owner of the instrument or is in wrongful  
27 possession of the instrument.

28 (08-45120-Peter A. Jacobson and Maria E. Jacobson)  
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